Case Numbers: 3201422/2020, 3202263/2020 and 3202385/2020

EMPLOYMENT TRIBUNALS

Claimant: **Mr E Adekola**
Mr Md Abdur Rouf

Respondent: **Brooknight Security Limited**

Heard at: **East London Hearing Centre**

On: **12 & 13 April 2022**

Reserved decision meeting: 1 July 2022

Before: **Employment Judge Barrowclough**

Members: **Ms J Clark**
Mr M Rowe

Representation:

For the Claimant: **Mr Michael Raffell (Employment Consultant)**

For the Respondent: **Ms Sophie Harkins (Employment Consultant)**

RESERVED JUDGMENT AND REASONS

The unanimous judgment of the Tribunal is that (a) both Claimants were unfairly dismissed and are entitled to compensation; (b) both Claimants' complaints of (i) breach of contract, (ii) direct race discrimination, and (iii) harassment related to their race, all fail and are dismissed.

REASONS

1 By means of three ET1 originating applications presented to the Tribunal, the Claimants Mr Ebenezer Adekola and Mr md Abdur Rouf raised a number of complaints against their former employers, Brooknight Security Limited. Those include (a) unfair

dismissal; (b) direct race discrimination; (c) harassment related to race; and (d) breach of contract. Both Claimants identified themselves as being black males. The Respondent resists and disputes all the Claimants' complaints. At a preliminary hearing of the Claimants' claims on 13 November 2020, Employment Judge Burgher made case management orders and directions, including that the Claimant's' claims be consolidated and heard together, together with identifying the issues to be determined at a full merits hearing. That took place before us by way of a remote hearing via the Cloud Video Platform on 12 and 13 April 2022, when we heard evidence from both Claimants and from Ms Julia Adam, the Respondent's head of support services, together with closing submissions form the parties' representatives, and at the conclusion of which we reserved out judgment due to a lack of available time. The Tribunal subsequently reconvened on 1 July 2022 in the absence of the parties for a reserved decision meeting in order to consider the evidence and submissions we had heard and read, and to reach these findings and conclusions.

2 The relevant facts and background can be summarised as follows. Both Claimants were employed by the Respondent as security guards or officers at the Choats Manor Way depot in Dagenham, Essex, Mr Adekola starting work there in August 2012, Mr Rouf in August 2015. As their name implies, the Respondent provides security services for commercial clients, and one of the sites at which they provide cover is that at Choats Manor Way where the Claimants worked, which is a substantial transport hub and lorry park covering a number of acres. The site and the facilities there are used by lorries and vehicles from a number of transport companies, including Eddie Stobart Ltd, who own the site and have their own dedicated entry and exit 'fast lane'. The Respondent's security officers or guards are based in a gatehouse at the entry/exit point to the site. We were told that initially there were five or six security guards at the gatehouse working in shifts, all of them being either black or from ethnic minorities.

3 The Claimants' original employer was a company called Vision Security Group Limited, and at some point which is not material there was a TUPE transfer of the site's security guards' employment from that company to MITIE, and then in July 2019 a further TUPE transfer to the Respondent, as is confirmed at page 81 in the trial bundle. We were provided with a copy of the Vision Security Group 'pro forma' contract for a security guard or officer, (pages 83 and thereafter). There is an issue as to whether or not this was the contract which was actually signed by and applied to the Claimants, no contracts signed by them having survived or at least been included in the bundle. Whilst both Claimants dispute that the contract at page 83 applies to them, both of them quote sections from that contract in their witness statements. Doing the best we can, and in the absence of any other documentation, we find that that the Claimants did in fact sign or agree employment contracts in identical terms to that at page 83.

4 That contract stipulates that security officers' normal hours of work are 48 hours per week, although the actual number and timing of such hours may vary, as they are dictated by the shift pattern at the individual or particular site. The Claimants' evidence was that during their time with both Vision Security Group Limited and MITIE they both worked a pattern of 4 days on followed by 2 days off, before re-commencing with a further 4 days' work; and that work pattern is evident and confirmed by the logs at page 95 in the bundle.

5 We were told by Mr Adekola that he was signed off sick for a prolonged period, from roughly December 2019 until May 2020, although he was uncertain as to the actual dates of his absence.

6 In any event, in early February 2020 Mr Webster, the Respondent's operations manager, wrote to all the security officers at the Choats Manor Way site indicating that he wanted to commence consultations with them concerning a potential alteration to their shift patterns, changing from the existing *'4 on 2 off'* basis to a *'4 days' on 4 days' off'* pattern: and inviting responses from individuals to that suggestion. Mr Webster followed up that communication by text on 29 February 2020, once again to all the security officers at Choats Manor Way, when he stated that all of them would go back to their current shift pattern of 4 days on, 2 days off (page 161). Furthermore, the security officers rota produced by the Respondent for March 2020 is at page 102 in the bundle; and that confirms that that work pattern had been restored and was then in operation. For the sake of completeness, pages 91 to 98 in the bundle cover Mr Rouf's working shift pattern during the last months in 2019, when he worked 4 days on and then 2 days off, up until January 2020, when his working hours significantly reduced. It is clear that, by the time of Mr Webster's text on 29 February at page 161, Mr Rouf along with his colleagues had been restored to their earlier *'4 on, 2 off'* shift pattern (see page 108). Page 102 also confirms that in March 2020 there were eight security officers at the Choats Manor Way site, including the two Claimants, all of whom were men, predominantly of BAME ethnicity.

7 Nevertheless, on Tuesday 3 March, Mr Webster wrote once again to the Claimants and their fellow security officers individually, once again proposing a change in their existing shift pattern to 4 days on followed by 4 days off, the proposed implementation date for that alteration being Wednesday 1 April. Mr Webster stressed in his letter (copies at pages 104/106) that this was at that stage only a proposal, and the Claimants were told that they would be contacted in writing in the near future and invited to formal individual consultation meetings in order to discuss the proposed changes to their shifts. It is however accepted by the Respondent that neither of those steps were ever taken: there were no follow-up invitation letters to security officers, and no such consultation meetings with any of them.

8 From 23 March 2020 onwards the UK was in lockdown as a result of the Covid-19 pandemic, and the impact of lockdown and the limited availability of work for the Respondent's security officers is reflected in the text correspondence passing between Mr Rouf and Mr Corey Fieldhouse, the security officers' manager, in late March and April that year. It appears that both Claimants were furloughed for the period from 12 April until 11 May 2020.

9 The next significant development was that both Claimants submitted similar, if not identical, grievances in early May, perhaps on 6 and 11 May 2020, as appears from the acknowledgment of Mr Adekola's grievance at page 116 . We cannot be more exact about either the contents or the date because we have not seen copies of either grievance, since the Respondent has apparently lost or otherwise disposed of both of them, and copies were not retained by either Claimant. It seems that their grievances related not only to changes in their shift patterns and loss of earnings due to limited work opportunities, but also the recent appointment of a security officer supervisor without that role having been advertised, together with allegations of race discrimination by their current manager, Mr Fieldhouse. That at least appears to be the position as set out in the letter from

Mr Phommachanh on behalf of the Respondent to Mr Adekola dated 27 May (pages 120/121), in which all his grievances were dismissed and not upheld.

10 Once again, it *seems* from pages 120/121 that there was a grievance meeting, at least with Mr Adekola, on 14 May, although the Respondent has been unable to provide any notes of such a meeting, or indeed any evidence of any grievance investigation having been undertaken. No evidence of any kind has been provided by the Respondent relating to any grievance process having been undertaken by the Respondent concerning Mr Rouf, whether by way of investigation, meeting notes or outcome letter.

11 In any event, and very shortly after the letter from Mr Zain to Mr Adekola of 27 May 2020 dismissing all his grievances, both Claimants received letters (in identical terms) from their manager Mr Fieldhouse dated 1 June inviting them to (separate) disciplinary hearings on 4 June (pages 125 & 127). The letters state that a full investigation had been undertaken by the site supervisor Mr Samuel Wood into an alleged incident on the evenings of 28 and 29 May when (it is said) the Claimants 'waved through' all lorries departing from the Choats Manor Way depot for a period of some three hours, without stopping any of them and/or obtaining exit passes or other paperwork from any individual lorry drivers. That was said to be in breach of a new operating procedure, which had been introduced following the Respondent's having taken over the security service provision at the depot in October 2019, and that doing so amounted to gross misconduct. The Respondent accepts that no evidence of any such investigation by Mr Wood has been provided to the Tribunal; and both Claimants' stated in unchallenged evidence that they had not been involved in any such investigation.

12 The Claimants also dispute that they were ever informed of any such new operating procedure being introduced in October 2019 or thereafter; and in any event, Ms Harkins accepted on behalf of the Respondent that neither Claimant had received any training or instruction following the procedure's alleged introduction. The Claimants' case is that the system in place at that time and thereafter was that security officers were only to stop individual departing lorries when they were told to do so by way of telephone instructions from the on-site transport office, or alternatively when a device called a '*spot checker*' (pictured at page 177 in the bundle) which is kept in the gatehouse randomly selected a lorry or trailer to be stopped; and that neither event occurred when (as they accept) they were on duty during the evenings of 28 and 29 May.

13 Both Claimants attended their respective disciplinary hearings unaccompanied on the morning of 4 June, both hearings being chaired by Mr Corey Fieldhouse. Mr Fieldhouse determined that both were guilty of gross misconduct and summarily dismissed both Claimants with effect from the following day, as set out in his subsequent letters to the Claimants dated 8 June (pages 137 to 140). Ms Harkins accepted that neither the new operating procedure, apparently introduced by the Respondent in October 2019 and which specified that any breach would amount to gross misconduct, nor details of any disciplinary procedure(s) which the Respondent applied, had been provided to the Tribunal or was included in the trial bundle. A note taker (Ms Theresa Woods) was present at both hearings, although no copies of the handwritten notes then taken have been provided to the Claimants, despite requests. At a later stage, copies of typed up notes from their disciplinary hearings were sent to both Claimants, although both of them alleged in the appeals which they subsequently presented that those notes were inaccurate, and did not reflect accurately what had been said (see pages 142/ 145).

14 Whilst the Claimants' account, as noted above, was that they were from time to time instructed by the on-site transport office to stop and check individual departing lorries, and that they would then do so by means of not raising the exit lane barrier, there is no evidence of any such (or indeed of any other) practice or procedure to be followed by security officers at the site. Although there is some documentation at pages 175/176 in the bundle concerning departing lorries, that appears to relate to Eddie Stobart vehicles only, which received special preferential treatment because that company owned the site; and in any event does not provide for vehicles being stopped and checked on the orders of the transport office, simply stating that random vehicle checks might be undertaken. Both Claimants' repeated evidence was that, apart from the random operation of the gatehouse' 'spot checker', they were to wait for instructions from the transport office before stopping any particular vehicle.

15 As noted above, the only witness from whom we heard on the Respondent's behalf was Ms Julia Adam, the head of support services, who confirmed that she had had no dealings personally with either Claimant; nor had she been involved in any capacity in the events relating or leading to their dismissal. The Tribunal was informed by Ms Harkins that all the individuals who had been so involved had since left the Respondent's employment and could not be traced. That of course may be correct, although it is difficult to see how it can possibly apply to Mr Corey Fieldhouse, the Claimants' manager who conducted both of their disciplinary hearings and who took the decision to dismiss them, since Ms Harkins confirmed that he is in fact the son of the Mr Fieldhouse who accompanied and was with Ms Adam at the time she gave her evidence to the Tribunal remotely.

16 In any event, both Claimants sought to appeal the decisions to dismiss them. Neither was successful. Whilst it is clear from pages 162 to 165 that Mr Adekola at least was invited to and duly attended an appeal hearing, albeit unsuccessfully, it is equally clear from the regional manager Mr Zain Phommachanh's letter to Mr Rouf dated 3 July at page 166 that the Respondent considered that there were no grounds on which he could appeal the decision to dismiss him, and accordingly his request for an appeal was refused.

17 Due to the failure of the parties' (and in particular the Respondent with its much greater resources, staff and, presumably, records) to provide anything like comprehensive documentation detailing their various dealings, it is by no means easy to provide an accurate or exact chronology of what happened. It is clear that during May 2020, both Claimants presented grievances to the Respondent. Mr Adekola's grievance was submitted on 11 May (page 116) and his (unsuccessful) grievance hearing with the Respondent's regional manager was on 14 May (pages 120/121). There are no documents concerning Mr Rouf's grievance or any grievance hearing in the bundle, although he refers to it in his email of 14 June when seeking to appeal his dismissal (page 141). As can be seen from pages 120/121 & 141, the Claimants' grievances included allegations of racial discrimination in the Respondent's recruitment and selection (by Mr Corey Fieldhouse) in March 2020 of a white man (Mr Sam Wood) for the role of supervisor of the security officers there, without advertising the vacancy either internally or externally. Those grievances were not upheld, and whilst relied on in relation to the Claimants' complaints of direct discrimination, were not identified as amounting to harassment at the preliminary hearing.

18 However, it is common ground that at some point during May 2020 two white females (not identified in the hearing before us) were appointed and commenced work as security officers alongside the Claimants and their colleagues at Choats Manor Way. Both

Claimants' evidence was that on an unknown day in late May they attended work together, taking over from the two female guards who had worked the previous shift, and that they then discovered a drawing on a single sheet of A4 paper, which had been left in an obvious place in the kitchen area of the site's gatehouse and which they were obviously intended to see. Drawn in black ink on the sheet of paper were two figures. One was a stick figure, apparently a standing human form with two legs and arms, the other being another stick figure, apparently an animal on all fours. The figures were not in any way detailed, for example with faces or features, and there was no writing or anything else on the sheet of paper, simply the two figures. Both Claimants say that the drawing was intentionally left for them to see as the security officers who were undertaking the next shift, and that the drawing has a straightforwardly racist and discriminatory meaning, contrasting the human figure with an animal. At the time, Mr Adekola complained immediately to a manager, who came to the gatehouse and took possession of the drawing, apparently intending to investigate; and it has not been seen since. Mr Adekola told us that he was too busy in alerting management to the drawing to take a photograph of it; Mr Rouf said that he had in fact taken a photograph of the drawing using his mobile phone, but that he cannot now find or locate his photo. So we have not seen the drawing or any photograph or image of it. Mr Rouf included this incident in his email of 14 June seeking to appeal the decision to dismiss him (page 141); the Respondent's response on 19 June was that this and other discrimination allegations were completely spurious, and that there was no evidence to support them.

19 During the course of cross-examination, Mr Adekola stated, we believe for the first time, that at the time of the shift handover to himself and Mr Rouf on the day that they saw the drawing referred to above, the two female security officers had whistled to him, he said as if they were calling a dog. That allegation was not raised at all by Mr Rouf, nor by Mr Adekola in his appeal submissions/request of 14 June 2020 (pages 151/153), nor in Mr Adekola's further particulars of discrimination provided in these proceedings (pages 24/25), nor at the preliminary hearing.

20 A few days later, on 3 June, the Claimants were once again working together, taking over from the two female guards who had worked the previous shift. On arrival in the gatehouse they found another sheet of A4 paper, in the same place in the kitchen area as the earlier drawing, on which the following words had been written in capital letters: *'If you didn't buy the coffee/milk don't fucking use it thieving cunts'*. A photograph of that document, taken by the Claimants, is included at page 180 of the bundle, from which can be seen that nothing further was written or drawn on that sheet of paper. The Claimants both complained in their appeal submissions/requests that that was an intentionally racist or discriminatory message directed against themselves; the Respondent did not accept what they described as a spurious allegation unsupported by evidence.

21 We consider first the Claimants' complaints of unfair dismissal. Pursuant to s.98 Employment Rights Act 1996, it is for the Respondent to prove, on a balance of probabilities, that their reason for dismissing the Claimants is a potentially fair one. In this case, the reason relied on in relation to both Claimants is conduct, falling within s.98(2)(b). If the Respondent succeeds in establishing that misconduct was in fact the reason for the Claimants' dismissal, the Tribunal will go on to determine whether the Respondent genuinely believed, on reasonable grounds and after an appropriate investigation, that the Claimants were guilty of misconduct (the well-known *Burchell* test); whether the Respondent adopted a reasonably fair disciplinary procedure; and whether dismissal was within the range of reasonable responses to such misconduct. Conversely, if the

Respondent fails to prove a potentially fair reason for dismissal, the Claimants' dismissal was unfair.

22 In our judgment and in both Claimants' cases, there is an almost complete absence of evidence that their actions in permitting a succession of lorries to depart the Choats Manor Way depot/site on the evenings of 28 and 29 May 2020 without stopping and checking any of them (as the Claimants accept they did) was in breach of any of the Respondent's instructions or procedures, or amounted to misconduct of any sort on their part, and in particular gross misconduct giving rise to potential summary dismissal. The Respondent has completely failed to adduce or evidence the procedure which it is alleged was introduced in October 2019 and which it is said the Claimants breached in acting as they did on 28 and 29 May 2020. They have also failed to provide any applicable disciplinary procedure, stipulating inter alia what might or could happen in the event of an employee's misconduct. Finally, the Respondent has failed to produce or disclose any evidence of the investigation report which it is said was compiled by the site supervisor Mr Samuel Wood in the very short period between 29 May and 1 June 2020 (when the Claimants were invited to attend disciplinary hearings) albeit without any input or involvement in any such investigation on the Claimants' part, and which report might have helped establish whether the Claimants, or either of them, were acting in breach of lawful instructions. To be set against those failures is the Claimants' repeated insistence that they were simply following the well-established working practice in allowing vehicles to leave the site without stopping, unless contrary instructions were received from the transport office or the 'spot checker' mechanism was activated.

23 The sole piece of evidence which the Respondent has provided in support of the Claimants' alleged misconduct are the dismissal letters in identical terms sent to both Claimants (pages 137 to 140). The author of those letters, Mr Corey Fieldhouse, was the Claimants' manager and the person who conducted their disciplinary hearings and who apparently took the decision to dismiss them. Mr Fieldhouse was not called as a witness before us because, as we were told was the case in relation to all the Respondent's employees who had any dealings with or were involved in the Claimants' cases, he had since left their employment and could not be traced or located. However, since we were told that Mr Corey Fieldhouse is the son of the Mr Fieldhouse who attended with and supported the Respondent's witness Ms Julia Adam when she gave her evidence to the Tribunal remotely, we do not accept or believe that to be the case, certainly in Mr Corey Fieldhouse's case, and accordingly we place no weight on what is said and set out in the dismissal letters.

24 It therefore follows that, for these reasons and in our unanimous judgment, the Respondent has failed to prove that conduct was their reason for dismissing the Claimants, and accordingly their dismissals were unfair. In reaching that conclusion, we bear in mind that the Claimants were dismissed very shortly after both of them had submitted grievances complaining about reductions in their working hours and shift work and alleging race discrimination, which grievances can hardly be said to have been addressed appropriately or with due seriousness by the Respondent on the evidence we heard and read. In the absence of any witness from the Respondent who had any dealings at all with the Claimants or those matters, it was not possible to explore or investigate those apparent failures by the Respondent to any extent.

25 In case we were mistaken in coming to those conclusions, and the Respondent has proved that the Claimants' misconduct was their reason for dismissing them, we make plain that we would go on to find that their dismissal was unfair in any event, essentially for the same reasons. There was simply no evidence before the Tribunal to establish a genuine belief by the Respondent in misconduct by the Claimants, or that it was based on reasonable grounds and after an appropriate investigation; the disciplinary procedure adopted by the Respondent fell far below any reasonable standard; and it is not possible to say in the prevailing evidential void that dismissal was within the range of reasonable responses.

26 One of the issues for determination identified at the preliminary hearing is whether the compensation due to the Claimants should be subject to any uplift, in the event that their unfair dismissal complaints succeeded, due to any failure to follow the ACAS Code concerning disciplinary appeals. In our view it is beyond argument that Mr Rouf's compensation should be uplifted, since he was denied the appeal hearing that he requested because the Respondent apparently considered that there were no grounds for any such hearing – see page 166. We consider that the appropriate percentage uplift should be 25%. In Mr Adekola's case, it appears that he was granted and attended an appeal hearing, albeit without a successful outcome, as appears from the confirmatory letters to him at pages 162 to 165; so no such breach or entitlement to any such uplift has been established.

27 We turn to the Claimants' complaints of breach of contract. These do not relate to their entitlement to notice pay, having been summarily dismissed, which will form part of the compensation payable and arising from their unfair dismissal; but rather, as set out in the preliminary hearing List of Issues, whether the Respondent unlawfully reduced their working hours from the contractual figure of 60 hours per week to less over a twelve week period. The Claimants were directed to quantify their claims in a schedule of loss; we are not aware that they have done so. In any event, and doing the best we can, we do not consider that any reduction in the Claimants' contractual working hours has been established in the period up until 12 April 2020, when both Claimants were furloughed as a result of the Covid-19 pandemic. In the first place, it is noteworthy that the 'pro-forma' contract at page 83 in the bundle, which we have found was essentially that agreed by the Claimants, provides for a 48 hour normal working week, rather than the 60 hours contended for by the Claimants. Whilst there is a provision included for working additional hours, there is no signed Working Time Regulations memorandum from either Claimant in the bundle; and the contract provides that working hours may vary, depending upon the shift pattern at the individual site.

28 Secondly, it is clear that both Claimants were working on the established *'4 days on, 2 days off'* pattern up until the end of December 2019 – see for example Mr Rouf's recorded hours at pages 95/98. It is equally clear from the email sent by Mr Webster, the Respondent's operations manager to all the Choats Manor Way security officers on 4 February 2020 (page 100A) that the work rota was then, as he described it, *'a mess'*, and that Mr Webster was proposing to introduce a *'4 days on, 4 days off'* shift pattern, before reverting to the current *'4 days on, 2 days off'* pattern on 29 February that year (page 101) when his earlier proposal was not acceptable. Mr Rouf's work calendar for March 2020 (page 108) confirms that he continued to work that shift pattern up until the national lockdown on 23 March. We do not have any such details for Mr Adekola, but find that it is most likely that he too worked that pattern at that time, assuming he was not then

signed off sick and bearing in mind that he was absent due to illness for much of the first quarter of 2020, returning to work at some stage in May that year.

29 The Claimants' furlough period ended on 11 May 2020, and once again there was no evidence before the Tribunal that their shifts or working hours were reduced in the period from then until their dismissal on 4 June that year. Whilst as noted the operations manager had proposed changing the working shift pattern for security officers at the site, that did not in fact happen, and the *'4 days on, 2 days off'* pattern was maintained. The documentation at pages 118 to 120 suggests that there was in fact agreement between Mr Rouf and his manager Mr Fieldhouse concerning the shift pattern that he worked in May, coinciding with Mr Adekola's return to work.

30 Overall, and for these reasons, we are not persuaded that any breach of contract as alleged has been established by either Claimant, and those complaints must be dismissed.

31 In relation to the Claimants' complaints of harassment, s.26 Equality Act 2010 provides that a person harasses another if he or she engages in unwanted conduct related to a relevant protected characteristic (in the Claimants' case, race), and that conduct has the purpose or effect of violating the complainant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the complainant. We consider first the drawing which the Claimants say they saw, specifically left for them by the two unnamed female security officers, in the kitchen area of the gatehouse one day in May 2020. The evidence concerning the document is, in our view, fairly limited. No copy of the image has been provided for us, and it is surprising that neither Claimant was able to provide us with a photograph, particularly since one was provided in support of the later alleged harassment. Mr Rouf told us that he had photographed the drawing, but that he can now no longer find the image on his phone. Since the drawing was of obvious significance and importance to the Claimants' complaints, we would expect strenuous attempts to have been made to identify or locate the missing image and to preserve it, both by Mr Rouf and by his representatives, seeking professional assistance if required. That does not seem to have happened. Secondly, it is clear from the discrimination particulars provided by Mr Adekola (pages 24/25) and from what both he and Mr Rouf said in their appeal requests/submissions (pages 141 and 151/153) that all the security officers at the gatehouse who were of BAME ethnicity considered that the image was directed against them, and that they all complained to their manager Mr Fieldhouse. Yet whilst four of the security officers, including the two Claimants, raised a collective grievance on 15 June in which they referred to the drawing amongst other issues, none of the Claimants' former colleagues were called as witnesses in support of the Claimants' claims.

32 Additionally, and bearing in mind that we have not seen the drawing or any copy of it, the existence of any connection between what was drawn on paper and the race or ethnicity of the Claimants and their colleagues on the one hand and the two white female security officers on the other is far from straightforward. From the Claimants' descriptions, the drawing was simply of two stick figures, with no features or characteristics included which obviously did or could relate to race. There was no writing or text on the page at all, and nothing to point to any distinction between the figures, other than that one was a standing human figure, and the other apparently an animal on all fours. Whilst we accept that in certain circumstances, and particularly with text and/or features added, such an

image could certainly amount to racial harassment, the picture of two stick figures as described to us with no additional material does not necessarily do so.

33 Mr Adekola told us in cross-examination and whilst being asked questions about the incident that the two female security officers had whistled to or at him during the relevant handover, as if calling a dog. However, that was the first time that he had raised that allegation, and such an incident, with it's obvious significance not only on its own but in conjunction with the drawing apparently left for him and his colleague Mr Rouf was neither mentioned to the Respondent at the time in conjunction with the disciplinary process, nor in Mr Adekola's witness statement or particulars of discrimination in these proceedings. We find that, had such whistling in fact happened, it would have been raised significantly earlier than in Mr Adekola's oral evidence, and we do not accept that such an incident in fact occurred. That finding is important, since in our view it tends to undermine Mr Adekola's credibility, certainly in relation to his account of the missing drawing complained of.

34 Weighing all these matters together, and bearing in mind that the burden of proving harassment is on the Claimants, we have come to the following conclusions. Whilst we are on balance satisfied that the drawing as described actually existed, not least because of the grievance raised concerning it by two of the Claimants' colleagues, we do not consider that it amounted to unwanted conduct relevant to a protected characteristic which had the purpose or effect described in s.26(1)(b) of the Equality Act, or was perceived as such by the Claimants. Had the Claimants in fact thought when they originally saw the drawing that it had offensive racist overtones, we believe that they would have ensured that the image was retained and preserved for future production, and that at the very least accessible photographs would have been taken of it. As it is, it was really only after the Claimants' dismissal that they started to rely on the drawing as amounting to harassment related to race.

35 With respect to the subsequent allegation of harassment, the factual background is significantly clearer, in that there is concrete evidence of the note which was probably if not certainly left for the Claimants, who were undertaking the following shift after the two white female security officers, assuming one or other of them to have written it. However, whilst the note is certainly couched in offensive if not aggressive terms, there is we find nothing in it, when viewed on its own, which relates to any protected characteristic. It is simply an injunction, albeit in very strong terms, not to use refreshment supplies belonging to others. The only way in which we consider it might amount to harassment is if the note was written in conjunction with the earlier incident of alleged harassment, as part of a campaign against or concerted attack on the Claimants. Since we have not accepted that earlier incident of alleged harassment occurred, it follows that in our judgment the handwritten note at page 180 did not relate to the Claimants' race.

36 For these reasons, the Claimants' complaints of harassment fail and are dismissed.

37 We turn finally to the Claimants' complaints of direct race discrimination. Section 13 Equality Act 2010 provides that a person discriminates against another if, because of a protected characteristic, he treats that person less favourably than he treats or would treat others. The well-established approach to direct discrimination complaints such as these is for the Tribunal to ask itself whether the Claimants have proved facts, on a balance of probabilities, from which we could conclude in the absence of an adequate explanation that the Respondent has committed an act of discrimination. If the Claimants do not prove

such facts, then their complaints will fail. The outcome at this stage will often depend on what inferences it is proper for the Tribunal to draw from the primary facts, since it is unusual to find direct evidence of discrimination. If the Claimants have proved facts from which inferences could be drawn, or we could conclude that the Respondent has treated them less favourably on a protected ground, then the burden of proof shifts to the Respondent. The Respondent must then prove, once again on a balance of probabilities, that their treatment of the Claimants was in no sense whatever on the protected ground. If the Respondent does so, then the claims fail; conversely, if the Respondent fails to do so, then they succeed.

38 The less favourable treatment alleged by the Claimants in this case is that in March 2020, the Respondent did not advise the Claimants or their black colleagues that a supervisor role was being considered or created for the security officer team, and recruited for that role without considering, inviting or permitting applications from or interviews with the Claimants or their colleagues, appointing a white male (who had been a security officer and was allegedly less experienced than the Claimants and their colleagues) to the position. The Claimants further allege that, when in about the third week of May 2020 they complained to their manager Mr Corey Fieldhouse about such discrimination and also about harassment related to their race by the two white female security officers, he did nothing about their complaints or reports, whereas that would not have been the case for a hypothetical white British security officer making such complaints. In both cases, it is said that the reason for such less favourable treatment was the Claimants' race.

39 The Respondent accepts that Mr Wood, a white British male, was appointed to the role of supervisor of the security team at Choats Manor Way by Mr Corey Fieldhouse in March 2020; and also that they did not advertise or invite applications, internally or externally, for that role. The Respondent's position, as was made plain to the Claimants in response to their grievances, is that there was no legal requirement and they were under no obligation to advertise that or other roles either internally or externally. However, and whilst of course we did not hear from Mr Fieldhouse or anyone else at the Respondent who had had any dealings with that process, the insuperable difficulty (as we find) for the Claimants is that it was their own evidence to the Tribunal that Mr Fieldhouse had appointed Mr Wood to the supervisor's role because he was a friend of his. Mr Adekola's clear evidence was that Mr Wood had told him that Mr Fieldhouse had appointed him to the role because they were friends, having previously worked together at Primark. Thus, on the Claimants' own account, the appointment had nothing to do with race or any other protected ground, or any related less favourable treatment, but was due to what might be described as 'matiness' or friendship, in that Mr Fieldhouse was *'looking after'* his friend. That may well have been unfair, but that does not assist the Claimants in the context of their direct discrimination complaints. The facts before the Tribunal do not entitle us to conclude that the Respondent committed an act of unlawful discrimination.

40 Nor can the second part of the Claimants' direct discrimination complaints succeed. There was, as we have found, no merit or substance in the Claimants' complaints to Mr Fieldhouse in May 2020 of either direct race discrimination or harassment related to their race. Faced with such complaints from a hypothetical white security officer, it cannot seriously be suggested that Mr Fieldhouse would have acted differently or more favourably, rather than simply dismissing them, as he did those complaints put forward by the Claimants.

41 For these reasons, the Claimants' complaints of direct race discrimination fail and are dismissed.

42 There will have to be a remedy hearing in relation to the Claimants' successful complaints of unfair dismissal, unless the parties are able to agree compensation in the interim. We direct that these claims be listed for such a hearing before us on the first open date after 28 days, with a time estimate of half a day.

Employment Judge Barrowclough
Date: 15 July 2022